



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 26, 1996

Ms. Jennifer D. Soldano  
Associate General Counsel  
Texas Department of Transportation  
Dewitt C. Greer State Highway Bldg.  
125 East 11th Street  
Austin, Texas 78701-2483

OR96-2257

Dear Ms. Soldano:

Your predecessor asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 37729.

The Texas Department of Transportation (the "department") received a request for "any and all documents of information that was used to make [the] decision" to terminate the requestor's employment. You assert that the requested information is excepted from required public disclosure under sections 552.101, 552.103, and 552.107 of the Government Code.

When asserting section 552.103(a), the "litigation exception," a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish (1) that litigation is either pending or reasonably anticipated and (2) that the requested information relates to that litigation. *See Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. You assert that litigation is reasonably anticipated because the requestor filed a claim of discrimination against the department with the Texas Commission on Human Rights. You have submitted the Charge of Discrimination to this office as evidence of this claim. In this instance,

we believe that you have established that litigation is reasonably anticipated. See Open Records Decision No. 336 (1982). Although the Charge of Discrimination refers only to race discrimination, the letter of termination to the requestor, as well as the requestor's open records request, states that the reason for termination was based on the findings of an investigation of alleged sexual harassment. You further state, and have submitted internal correspondence evincing, that the sexual harassment investigation may be raised by the requestor in the anticipated litigation. Thus, we further conclude that the information requested is related to the anticipated litigation and, therefore, may be withheld under section 552.103 of the Government Code.

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing party in the anticipated litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In the event that the litigation has concluded or is no longer reasonably anticipated, we will also address your other arguments against disclosure of certain information.

You assert that section 552.107 excepts a letter from Ms. Sharon Schweitzer, Assistant Attorney General, to Ms. Jana Nava, Director of the Division of Civil Rights of the department, dated October 26, 1994. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We find that the letter either reveals the client's confidential communications or the attorney's legal opinion or advice and, therefore, may be withheld under section 552.107 in its entirety.

You also assert that certain information is excepted under section 552.101. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. This exception applies to information made confidential by the common-law right to privacy. *Industrial Foundation*

*of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *Id.* In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Based on *Ellen* and prior decisions of this office, *see e.g.*, Open Records Decision Nos. 393 (1983), 339 (1982), we believe that the release of the affidavit of the requestor and the Report of Investigation sufficiently satisfies the public's interest. However, the department must withhold, under section 552.101, the identities of the witnesses to the alleged harassment and the identity of the alleged victim, and any information which would tend to identify the witnesses or victim, in both of these documents. We have marked these documents to indicate the information which must be withheld. The alleged victim's written complaint and the detailed statements of the witnesses must be withheld under section 552.101.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese  
Assistant Attorney General  
Open Records Division

RTR/rho

Ref.: ID# 37729

Enclosures: Marked documents

cc: Mr. Tyrone Bell  
1868 Green Ridge Drive  
Carrollton, Texas 75007  
(w/o enclosures)